STATE OF MICHIGAN

COURT OF APPEALS

ATLANTIC NATIONAL TRUST, LLC, d/b/a ATLANTIC CAPITAL INVESTMENT, LLC,

Plaintiff-Appellant/Cross-Appellee,

v

MIDWEST MACHINE TECHNOLOGIES, LLC, MIDWEST MACHINE & MANUFACTURING COMPANY, MIDWEST TECHNOLOGY, INC., COMMUNITY SHORES BANK, and ROBERT E. PRATEL,

Defendants,

and

HUNTINGTON NATIONAL BANK,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 5, 2008

No. 273083
Muskegon Circuit Court
LC No. 02-041646-CH

Before: O'Connell, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

In this breach of contract action, plaintiff Atlantic National Trust, LLC, (Atlantic) alleged that defendant Huntington National Bank (Huntington) violated the third party lienholder agreement when Huntington, upon selling the assets of Midwest Machine and Manufacturing Company (Midwest), applied the proceeds from the sale to future advances that were not made for the purpose of protecting or preserving existing collateral. Atlantic appeals as of right the trial court's final judgment, which was entered after a bench trial. Huntington cross appeals. Because the trial court erred in concluding that Loan 75, a line of credit, expired one year after it originated, we reverse and remand for entry of an order of no cause of action.

I. Background

In 1996, Robert Pratel purchased the stock of Midwest. Huntington,[1] as evidenced through a loan write-up and commitment letter, proposed to lend Pratel more than $1,350,000 to finance the stock purchase. The $1,350,000 would come from three loans, all to be secured by the real and personal property of Midwest: (1) "Loan 18," a $1,000,000 loan to purchase the Midwest stock; (2) "Loan 26," a $171,645 loan to pay off the notes held by Midwest's former shareholders; and (3) "Loan 75," a $200,000 line of credit to pay off Midwest's existing line of credit at First American Bank. The commitment letter stated that Loan 75 would expire "[o]ne year from closing date." The $1,000,000 loan would be financed, in part, by a 504 loan from the Small Business Administration (SBA). The 504 loan, which also was to be secured by the real and personal property of Midwest, would be subordinate to the three loans from Huntington.

The SBA, upon receiving from the 504 loan application from the West Michigan Certified Development Company (WMCDC), approved the loan. According to Richard Pasiak, an attorney with the SBA, the SBA intended that its interest in Midwest's real and personal property would be subordinate only to Loan 18. But, according to Martha Zimmer, the Huntington employee who prepared the loan write-up, the SBA's understanding of its secured position was never communicated to Huntington. Zimmer testified that, had the SBA communicated its understanding of its secured position, Huntington would not have closed on the three loans. Huntington closed the three loans in the summer of 1996, and on Loan 26, Huntington advanced $163,147.47 to Midwest, rather than the $171,645 stated in the commitment letter and loan write-up.

In January 29, 1997, Zimmer signed a third party lienholder agreement (TPLA), in which Huntington agreed:

> No future advances shall be made that are collateralized by the security interests described herein, except advances to preserve and protect the collateral of Third Party Lienholder's interest in the collateral (including foreclosure costs).

According to Zimmer, the TPLA only applied to Loan 18. Consequently, Huntington made no future advances to Midwest on Loan 18.

Throughout the following years, Huntington made several advances to Midwest on Loan 75. In December 1997 and at times throughout 1998, the balance on Loan 75 exceeded $200,000. In November 1998, Huntington created "Loan 91," a seven-year term loan for $250,000. The purpose of Loan 91 was to pay off Loan 26, which at the time had a balance of $97,527.36, and Loan 42[2] and to give Midwest $121,500 in new money to purchase new equipment, to finance building repairs and maintenance, and to finance an upgrade of the office area. Over the course of the next year, Huntington advanced $124,515, rather than just $121,500, on Loan 91 to Midwest.

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[1] Huntington is the successor of FMB Lumberman's Bank, which was the lending bank in 1996.

[2] The origin of Loan 42 is unknown.

In the summer of 2000, Midwest defaulted on the 504 loan and on Loans 18, 75, and 91. That fall, Midwest voluntarily surrendered to Huntington its equipment, machinery, accounts receivable, contract rights, and cash.

The next spring, in March 2001, Huntington assigned its interest in Midwest's real estate to a third party for $410,000. Of the $410,000, Huntington applied $327,110 to Loan 18 and $82,890 to Loan 91. In June 2001, Huntington sold the property voluntarily surrendered by Midwest for $340,000. Of the $340,000, Huntington applied $204,116 to Loan 75 and $117,938 to Loan 91. The remaining $18,000 was used for interest payments and expenses. At the end of June 2001, $60,270 remained to be paid on Loan 18, $30,738 on Loan 75, and $21,038 on Loan 91.

The trial court found that the TPLA's prohibition against future advances applied, not only to just Loan 18, but also to Loans 75 and 91. Regarding Loan 18, the trial court found that there was no violation of the TPLA. Regarding Loan 75, the trial court found that the line of credit expired in June 1997, at which time there was a balance of $100,000, and that any money advanced after that time was a future advance in violation of the TPLA. Consequently, the trial court held that, of the $204,115 in proceeds from the sale of Midwest's assets that Huntington applied to Loan 75, $104,115 was applied to future advances made in violation of the TPLA. Regarding Loan 91, the trial court found that any money Huntington advanced beyond the $171,645 stated in the commitment letter was a future advance. Thus, the $27,842, the difference between the balance of Loan 26 in November 1998 and the opening balance of Loan 91, was a future advance. But, according to the trial court, only $19,989 was a future advance in violation of the TPLA because the remaining $7,853, the difference between the original loan amount on Loan 26 and the amount actually loaned,[3] had not previously been loaned by Huntington. In addition, the $124,515 loaned in new money was a future advance, but only the unexplained $3,015 was a future advance made in violation of the TPLA. The trial court found the remaining $121,500 did not violate the TPLA because it was used to purchase new collateral or to preserve existing collateral. The trial court concluded that, although Huntington advanced $23,004 to Midwest in violation of the TPLA on Loan 91, Huntington only applied $1,966 in proceeds from the sale of Midwest's assets to amounts advanced in violation of the TPLA. This amount equaled the difference between the amount of improper future advances and the balance of Loan 91 at the end of June 2001. The trial court ultimately held that Atlantic was entitled to a judgment for $45,810, which equaled the amount of proceeds that Huntington applied to future advances on Loans 75 and 91 that were made in violation of the TPLA minus $60,270, the balance of Loan 18 at the end of June 2001. According to the trial court, because there was no violation of the TPLA with regard to Loan 18, Huntington was entitled to apply another $60,270 of the proceeds from the sale of Midwest's assets to eliminate the balance of Loan 18.

II. Analysis

[3] This amount was incorrectly calculated by the trial court. The correct amount is approximately $8,498.

Following a bench trial, this Court reviews for clear error a trial court's factual findings and reviews de novo its conclusions of law. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A factual finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 222; 707 NW2d 353 (2005).

A

Atlantic claims that, because Huntington failed to present any evidence regarding how Midwest actually spent the $121,500 advanced in new money under Loan 91, the trial court erred in finding that the future advance did not violate the TPLA. According to Atlantic, because information of how Midwest actually used the $121,500 was within the possession of Huntington, Huntington had the burden of proof regarding Midwest's actual use of the future advance. We disagree.

"A plaintiff's burden of proof encompasses two separate concepts: (1) the burden of persuasion, and (2) the burden of going forward with the evidence." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175-176; 530 NW2d 772 (1995). While the burden of going forward with the evidence, i.e., the burden of persuasion, may shift between the parties as the parties present evidence, the burden of persuasion never shifts from the plaintiff to the defendant. *Id.* at 176; see also *Michigan Tractor & Machinery Co v Elsey*, 216 Mich App 94, 102; 549 NW2d 27 (1996). Thus, Atlantic bore the ultimate burden of proving its damages. See *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976). Stated differently, Atlantic bore the ultimate burden of proving that Huntington made future advances to Midwest that violated the TPLA and the amount of those advances.

To support its claim that Huntington had the burden to prove Midwest's actual use of the $121,500, Atlantic relies on *Gnau v Masons' Fraternal Accident Ass'n of America*, 109 Mich 527, 535; 67 NW 546 (1896), in which the Supreme Court stated that, when facts are within the peculiar knowledge of the defendant, the defendant has the burden to prove the facts. We agree, however, with Huntington that *Gnau* is not applicable because it was decided before the advent of modern discovery. The Supreme Court liberated discovery in the General Court Rules of 1963. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 724 n 7; 691 NW2d 1 (2005). Discovery was "opened even more expansively" in the Michigan Court Rules of 1985. *Id.* Under the court rules, discovery is permitted of any matter, which is not privileged, that is relevant to the subject matter in the pending case. MCR 2.302(B)(1); *Hamed v Wayne Co*, 271 Mich App 106, 109; 719 NW2d 612 (2006). "The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). Assuming that information regarding how Midwest actually spent the $121,500 advanced in new money on Loan 91 was within the possession of Huntington,[4] the liberal rules

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[4] We are not convinced this information would necessarily be within Huntington's possession. There is no evidence that, pursuant to any agreement between the parties, that Huntington was (continued…)

of discovery allowed Atlantic to obtain from Huntington all the information Huntington possessed regarding Midwest's actual use of the $121,500. *Hamed, supra*. Accordingly, we see no reason to shift the ultimate burden of persuasion regarding Atlantic's damages to Huntington.[5]

Because Atlantic bore the burden of persuasion regarding the amount of future advances Huntington made to Midwest in violation of the TPLA, the trial court's finding that Midwest used the $121,500 in new money for the purposes requested was not clearly erroneous. The only evidence presented by the parties regarding how Midwest actually used the $121,500 was the loan facility request, in which Midwest requested the $121,5000 to purchase new equipment, to finance building repairs and maintenance, and to finance an upgrade of the office area. Because Atlantic presented no evidence to indicate that Midwest did not use the $121,500 for the purposes requested, the trial court's finding that Midwest used the $121,500 for the reasons outlined in the loan facility request was not clearly erroneous. *Ligon, supra*.

Similarly, the trial court's finding that the entire $121,500 was a permissible future advance under the TPLA was not clearly erroneous. While Atlantic does not contest that the money advanced by Huntington to finance building repairs and maintenance was a permissible future advance under the TPLA, Atlantic contends the money advanced to purchase new equipment was an impermissible future advance because the TPLA only permitted future advances to "preserve and protect the collateral."[6] However, assuming the money advanced to purchase new equipment was an impermissible future advance, Atlantic failed to introduce any evidence indicating what percentage of the $121,500 was used by Huntington to purchase new equipment. Because some portion of the $121,500 was clearly a permissible future advance under the TPLA and because Atlantic did not provide the trial court with any evidence indicating what percentage of the $121,500 was not used by Midwest to finance building repairs and maintenance, the trial court's finding that the entire $121,500 advanced in new money was a permissible future advance was not clearly erroneous. *Ligon, supra*.

(…continued)

required to ensure that Midwest used the money for the requested purpose. In addition, Atlantic has not cited any authority for the proposition that a bank, after it has advanced money, must ensure that the borrower used the money for the requested purpose.

[5] In addition, Atlantic claims that, because the phrase "except advances to preserve and protect [the] collateral" in the TPLA is a proviso rather than an exception, Huntington had the burden of proof to show how Midwest actually used the $121,500. See *N & M Friedman Co v Atlas Assurance Co*, 133 Mich 212, 221; 94 NW 757 (1903). It has been said, however, that the "fine distinctions" between an exception and a proviso are academic, *Saginaw Co Twp Officers Ass'n, Inc v Saginaw*, 373 Mich 477, 482; 130 NW2d 30 (1964), and that the fine distinctions are difficult to apply in practice, *N & M Friedman Co*, *supra* at 221. Atlantic merely assumes, without providing any analysis, that the contested phrase is a proviso. Accordingly, Atlantic has abandoned the claim. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority") (citations omitted).

[6] Atlantic also contends that the money advanced to finance the upgrade of the office area was not a permissible future advance. We find no merit to the argument because Huntington's three loans were secured by a mortgage on Midwest's real estate.

B

Atlantic also claims the trial court erred in determining that, of the $204,115 in proceeds from the sale of Midwest's assets that Huntington applied to the Loan 75, only $104,115 was applied to impermissible future advances. According to Atlantic, because Loan 75 was a one-year line of credit and because Midwest had repaid the $100,000 balance existing at the time of the loan expiring in June 1997 many times over in the following four years—Midwest claims it had paid $1,404,239.28 on the loan from June 1997 to June 2001—the actual impermissible future advances on Loan 75 equaled $1,169,384.72.[7] In its cross-appeal, Huntington claims that, because a line of credit, a tool which enables a business to maintain its day-to-day operations, is expected to be renewed, the trial court erred in finding that Loan 75 expired in June 1997. We agree with Huntington.

The purpose of Loan 75, according Stephen George, a senior vice-president at Huntington, was to enable Midwest to maintain its working capital. It replaced Midwest's existing line of credit with First American Bank. Zimmer testified that a line of credit is generally renewed annually. Although the commitment letter did not indicate that Midwest and Huntington intended Loan 75 to be renewed annually, the commitment letter, as stated by counsel for Huntington at oral argument, does not stand in vacuum. It stands beside Huntington's detailed write-up of the three loans, which was submitted to the WMCDC and the SBA. In the cash flow analysis section of the loan write-up, Huntington made no provision for the repayment of principal by Midwest on Loan 75. It only provided for the repayment of interest. Of the $168,000 of Huntington's proposed annual debt service to Midwest, $21,000 was serviced for Loan 75, which equaled the annual amount of interest Midwest would owe on Loan 75. In addition, Huntington projected that its annual debt service to Midwest would decrease to $164,000 for 1998 and 1999.[8] Because Huntington made no provision for Midwest to repay the principal on Loan 75 and because Huntington proposed that Midwest would pay $21,000 in interest on Loan 71 after June 1997, along with the general understanding within the banking industry that a line of credit will be renewed annually, we are left with a definite and firm conviction that the trial court made a mistake in concluding that Loan 75 expired in June 1997 and that all advances made after that date violated the TPLA. *Heindlmeyer*, *supra*. Consequently, the trial court clearly erred in finding that, of the $204,115 in proceeds Huntington applied to Loan 75, $104,115 was applied to future advances made in violation of the TPLA. Because Loan 75 did not expire in June 1997, Huntington was entitled to apply $200,000 of the proceeds from the sale of Midwest's assets to the outstanding balance of Loan 75. Only the additional $4,115 was applied to future advances made in violation of the TPLA.[9]

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[7] This amount equals the total amount Midwest paid on Loan 75 from June 1997 to June 2001 minus the balance of the loan in June 2001, $234,854.56.

[8] It decreased because the Textron lease expired.

[9] George testified that he would consider any amounts Huntington advanced to Midwest on Loan 75 above the original loan amount of $200,000 to be future advances. We will assume the future advances violated the TPLA.

C

Our determination that the trial court clearly erred in finding that Loan 75 expired in June 1997 renders it unnecessary for us to address any of the remaining issues on appeal. The trial court found that, because there was no violation of the TPLA with regard to Loan 18 and because there was a balance of $60,270 on Loan 18 in June 2001, the amount of proceeds from the sale of Midwest's assets that Huntington applied to future advances made on Loans 75 or 91 in violation of the TPLA must be offset by $60,270. On Loan 75, based on our analysis above, Huntington applied $4,115 of proceeds to future advances made in violation of the TPLA. On Loan 91, accepting Atlantic's argument on appeal that the trial court clearly erred in finding that $8,498, the difference between the proposed loan amount and the amount actually loaned, was a future advance, Huntington applied $10,464 of proceeds to future advances made in violation of the TPLA. However, because these amounts when added together do not exceed $60,270, Atlantic suffered no damages. We, therefore, reverse the trial court's judgment in favor of Atlantic and remand for entry of an order of no cause of action.

Reversed and remanded for entry of an order of no cause of action. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski